[2017] UKFTT 850 (TC)

TC06245

Appeal number: TC/2016/00909

HYDROCARBON OIL DUTY - appellant's vehicle tested positive for red diesel – restored for fee – desk audit of vehicles and fuel usage – assessment of rebate amount covering four years and 3 vehicles – whether assessment excessive – calculations flawed – assessment very substantially reduced – penalty for excise wrongdoing – whether validly imposed: no – if valid, very substantially reduced – appeals allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID AINSWORTH **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
BEVERLEY TANNER

Sitting in public at Alexandra House, Manchester on 1 November 2017

The appellant in person

Ms Joanna Vicary, instructed by for the Respondents

DECISION

1. This was an appeal by Mr David Ainsworth ("the appellant") against an assessment to excise duty of £4,577 and against a revised assessment of a penalty under paragraph 3 Schedule 41 Finance Act ("FA") 2008 of £2,643, both made by the Commissions for Her Majesty's Revenue and Customs ("HMRC"). Both the duty and the penalty assessment related to the fuelling of vehicles and the use on public roads of marked gas oil ("red diesel") legitimate use of which is confined, with exceptions not relevant in this case, to vehicles not used on the public highway.

2. The outcome of the appeal is that the excise duty assessment is very substantially reduced from £4,577.00 to £31.21 and the penalty is cancelled.

Evidence and Facts

The evidence

3. We had witness statements with exhibits from Mr John Mawdsley and Mr Kenneth Goodliffe. Both are officers of Revenue and Customs: Mr Mawdsley was the officer who was on duty at a roadside random check of fuel in vehicles and who took a sample of fuel from Mr Ainsworth's vehicle, while Mr Goodliffe was the officer who carried out a compliance check into the appellant's use of red diesel and made the assessments.

4. Both officers adopted their witness statements as read and were not cross-examined by the appellant. They were both asked questions by the Tribunal.

5. Mr and Mrs Ainsworth both gave evidence of their side of events, particularly of Mr Goodliffe's investigation and their response to it. Mr Ainsworth was cross-examined by Ms Vicary and asked some questions by the Tribunal.

6. We set out below the facts we find from the written evidence. This is mostly not in dispute. After this we make findings about other matters.

Facts not in dispute

7. On 10 April 2014 the appellant was driving a vehicle he owned, a Ford Transit Tipper registered BN08ZTR ("the tipper"), in the Burnley area when he was diverted by police to a mobile Road Fuel Testing Unit of HMRC.

8. Mr Mawdsley, who was on duty at that unit with a colleague, took a sample of the fuel in the appellant's tipper. It tested positive for the presence of red diesel, and was a reddish colour. Mr Mawsdsley gave the appellant a copy of the test sample report which showed among things no trace of coumarin, the marker for kerosene.

9. Because of the presence of red diesel Mr Mawdsley seized the vehicle as liable to forfeiture under section 139 Customs and Excise Management Act 1979

("CEMA")[1]. In response to a question from us he said that also seized the fuel. He then interviewed the appellant under caution. From the transcribed entries in his notebook[2], which were not disputed by the appellant, we could see that:

(1) the appellant told Mr Mawdsley that he had not put red diesel in the tank, but that an employee of his, Caleb, may have done so to save money. This could have come about because the appellant would give him cash, say £20, to fuel the vehicle, and Caleb could have filled it with red diesel instead and pocketed the difference. The appellant also told us in evidence that Caleb was not good with money, by which we understood him to mean that Caleb need more money than he earned to maintain his lifestyle,

(2) the appellant had said that he used red diesel to fuel a jet wash and machines that he used for his businesses of laying concrete groundwork. In evidence to us he said that his purchases of red diesel were small and that he had asked his supplier for records of their dealings but was told his business was insufficiently large for his supplier to bother,

(3) he denied putting red diesel to use in his vehicles himself, but admitted that he knew it was an offence to do so,

(4) he gave details to Mr Mawdsley of other vehicles he had or owned, including a Ford Transit Connect van ("the van"), a Nissan minibus ("the Nissan") and an Audi A3 all of which were diesel engined and a SAAB that used petrol,

(5) he was asked if any of those vehicles had red diesel in their tanks. He said no unless Caleb had put it there,

(6) when asked if he could explain why his vehicle had red diesel in it he said "I think one of the lads may have put red diesel into the vehicle. I've never done it but obviously I'm [the] one responsible",

(7) the appellant was asked if he had been involved with Customs before. The appellant said that he'd had them [ie vehicles] tested and "they've always been OK", and

(8) the appellant signed the notes as an accurate account.

10. Following the interview Mr Mawdsley offered to restore the vehicle on payment of £539[3]. This was calculated, according to the copy of the restoration agreement, as the equivalent of two penalties of £250 that were chargeable under s 13(1)(a) and (b) respectively of the Hydrocarbon Oil Duties Act 1979 ("HODA") for using red diesel

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[1] That is how the Seizure Information Notice reads. In fact the fuel in vehicles is liable to forfeiture by virtue of s 13(6) Hydrocarbon Oil Duties Act 1979. The vehicle itself is liable to forfeiture by virtue of s 141(1)(a) CEMA. In both cases the seizure itself is made under the powers in s 139 CEMA. The notice should read "seized the vehicle under section 139 [CEMA] as liable to forfeiture".

[2] Mr Mawdsley's handwriting was not easy to read.

[3] By contrast with the Seizure Information Notice (fn. 1) the Agreement for Restoration said the vehicle was "seized as liable to forfeiture … under section 141 [CEMA]" This is also wrong as the seizure was under s 139 and s 141 it was that made the vehicle liable to forfeiture.

and for being liable for putting it in the vehicle, and £39 which was the estimate of the rebate of duty on a full tank of red diesel.

11. The appellant accepted the offer and his vehicle was restored.

12. On 3 December 2014 Mr Goodliffe wrote to the appellant. He referred to the test on the fuel tank of the vehicle and explained that what the appellant had done was classed as an "excise wrongdoing".

13. He further said that he would be carrying out a compliance check to establish the extent to which the appellant had misused red diesel and he would use the information to work out what duty had to be paid.

14. He also needed, he said, to find out why he misused fuel in order to work out any penalty that HMRC might charge him.

15. He then asked for information to be supplied by 30 December 2014[4]. This was said to be a request under s 118B CEMA[5]. Failure to comply could lead to an onsite and possibly unannounced check of records, premises and vehicles. It might also lead Mr Goodliffe to raise an assessment to duty based on the information he possessed.

16. The appellant was also warned that a penalty under Schedule 41 FA 2008 ("Schedule 41") may be charged.

17. The schedule attached to the letter asked for:

(1) A list of vehicles and machinery that run on diesel and that were owned by the appellant and any business he controlled in the period 1 January 2011 to 10 April 2014

(2) For each vehicle, information about type of vehicle, its use, date of purchase, date of sale, average weekly mileage, average mpg vehicle fuel, tank size, off road dates and current mileage records.

(3) For each vehicle, service records, MOT certificates, V5 registration document and fuel receipts or invoices.

In relation to items (2) and (3) we have omitted items which were not relevant to this case.

18. Finally Mr Goodliffe attached leaflets about compliance checks, the Human Rights Act and penalties for VAT and excise duty wrongdoing.

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[4] ie a maximum of 27 days including the Christmas period. HMRC's Compliance Handbook says at CH23420 (of notices under Schedule 36 FA 2008) "as a general rule of thumb, it might be reasonable to expect that most information or documents could be provided or produced within 30 days from the date of the notice but may need to be longer around a business's seasonal peaks."

[5] It was nothing of the sort. Section 118B applies only to "revenue traders" of which the appellant was not one, as Mr Goodliffe accepted when asked by us.

19. On 5 January 2015 Mr Goodliffe followed up his letter of 3 December which he said had sought "books and records" for the tipper and any other vehicles operated by the appellant. Mr Goodliffe referred to regulation 48 of the Hydrocarbon Oil Regulations 1973[6] "and/or" s 118B CEMA[7] as requiring the appellant to produce the records on demand.

20. The appellant was given 14 days from the date of the letter to produce the requested records. Failure to comply by that date would lead to an "officer's assessment" of duty and an associated wrongdoing penalty would be issued on the basis that no disclosure had been made.

21. On 20 January 2015 Mr Goodliffe wrote again to the appellant. He pointed out that s 12(2) HODA provided that rebated mineral oil shall not be used as road fuel or be taken into a road vehicle as fuel and that where there is a contravention of s 12(2), s 13(1A) HODA allows as assessment of an amount equal to the rebate.

22. He added that despite "several"[8] requests for books and records none had been submitted, and so an assessment of £5,863 for the "duty on the rebate" had been raised.

23. The assessment had been made, he said, using his best judgment and on the basis that, on the balance of probabilities, red diesel had been used for all mileage of the vehicles owned or used by him, and a schedule of workings was enclosed.

24. The assessment showed that for the period 21 January 2011 to 22 March 2011 the duty was £160.98 and for the period 23 March 2011 to 10 April 2014 it was £5,702.27. Mr Goodliffe explained to us that the rate of rebate had changed in March 2011 hence the two rows of figures.

25. The calculations showed for each of the 3 vehicles of which HMRC had obtained details (the tipper, the van and the Nissan) the date the vehicle was acquired, the number of days between that date and 10 March 2014, the estimated average annual mileage (14,000), the estimated daily mileage of 38.4 and the estimated mileage for the period of each vehicle.

26. Using an estimated mpg figure from industry sources the number of litres used per day and the litres used over the period of ownership to 10 April 2014 were calculated for each vehicle. From the total fuel used in litres a deduction of £0 was

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[6] "A person concerned with the supply or use of any oil, bioblend or bioethanol blend shall, at all reasonable times, produce to an authorised person on demand all relevant books and other documents relating thereto." This seems wide enough, out of context at least, to apply to all drivers of all vehicles using "oil", which in regulation 2 is defined as "hydrocarbon oil". On a quick examination of the regulations "use" in context is given a restricted meaning which neither catches every driver of a petrol or diesel fuelled vehicle nor an admitted end user of red diesel for legitimate purposes such as the appellant.

[7] See fn. 5.

[8] Two in fact.

given for "fuel purchased[9]" and the amount then multiplied by the rate of rebate to give the amount due.

27. It was not apparent from the correspondence how Mr Goodliffe had obtained the details of the vehicles, as they had not been given to him or to Mr Mawdsley by the appellant[10]. In the course of giving evidence Mr Goodliffe took us to extracts from the Police National Computer obtained on 14 May 2014 in relation to all vehicles registered at the appellant's address, three of which were included on the calculation schedule (the other two were a petrol engined car and the Audi (see §9(4)) registered to Mrs Ainsworth). The PNC records gave the date that the appellant was registered as keeper. The PNC records also showed that as at that date the VEL (Vehicle Excise Licence) of the two vehicles on the schedule other than the tipper had expired. It did not say that either was off road, although that was said in relation to the petrol engined car (see §9(4)).

28. On 21 January 2015 Mr Goodliffe made a note on his computer that Mrs Ainsworth had called and he recorded that the "trader" had made further enquiries about the purpose of the letters. Mr Goodliffe told her that they needed the books and records to establish whether there was any historic misuse, and he records Mrs Ainsworth as saying that all books and records would be submitted ASAP.

29. On 23 February 2015 Mr Goodliffe issued a letter explaining that the attached schedule gave details of the penalty that HMRC intended to charge. The total penalty was £3,896.

30. The Explanation Schedule was headed "Failure to notify" ("FTN") and described the FTN in question. This was that on 10 April 2014 the tipper was found to be running on red diesel in contravention of s 12(2) HODA, and that no records had been submitted despite requests.

31. The behaviour of the appellant on that occasion was said to be deliberate because the vehicle was found to be running on red diesel and he had accepted responsibility for this, though denying he had fuelled the vehicle himself.

32. The disclosure (of what is not stated) was said to be prompted because the appellant did not tell HMRC about the FTN before discovery by HMRC.

33. The penalty range for a prompted disclosure made more than 12 months from the date the tax became unpaid was 35% to 70%.

34. A total reduction of 3.5%, 10% of the percentage points in the range, was given for the quality of the disclosure, all for what HMRC call "telling".

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[9] ie legitimate "white" diesel purchases.

[10] Except the registration number of the van.

35. The potential lost revenue to which the percentage of 66.5% was applied was given as £5,860[11] and the period of any assessment would be 21 January 2011 to 9 April 2014 (ie the day before the and testing of the fuel in, and the seizure of, the tipper).

36. On 20 March 2015 a notice of penalty assessment was given to the appellant. It said:

> "This is a notice of a liability to a penalty under Schedule 24 of the Finance Act 2007 as amended by Schedule 41 of the Finance Act 2008".

37. The notice however referred to wrongdoing penalties.

38. On 13 April 2015 HMRC received a letter from Mr Ainsworth. This referred to "our telephone conversation" and said that it enclosed receipts for [the fuel put in] the vehicles. He explained that one of his employees had used rebated fuel as the van had run out of diesel. He did not condone it and it was only used in an emergency to get the vehicle to a petrol station.

39. Vehicle details were included:

(1) Ford Transit Tipper: mileage 107,000, mpg 20, average yearly mileage 10,000

(2) Ford Connect (the van): bought 5/2013 sold 12/2013

(3) Nissan Elgrand 8 seat minibus: not in use (sorned), current mileage 86,000, average yearly mileage 1,000 maximum, usage was personal.

40. On 21 April 2015 Mr Goodliffe wrote with the results of his review following the appellant's letter.

41. He said that there was evidence of 996.52 litres of legitimate ("white diesel") fuel purchases in the period, but that there was a significant shortfall of such purchases to cover the mileage performed. A list of purchases compiled by Mr Goodliffe with dates and amounts was in our bundle – the dates start on 23 July 2012 and end on 3 March 2014.

42. As to the Nissan, Mr Goodliffe said there was no evidence of the vehicle being SORNed[12] in the relevant period. The MOT history showed the odometer[13] reading on 2 August 2012 was 74,522 miles, therefore 11,478 miles had been driven in the 882 days up to 31 December 2014 when the vehicle was SORNed. This made the average mileage 4,749 miles a year and the figures had been amended accordingly.

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[11] £3 less than the duty assessment.

[12] Subject to a Statutory Off Road Notice (given by the keeper to DVLA).

[13] Milometer for non-petrolheads.

43. Mr Goodliffe said that the appellant had failed to provide evidence of private use (eg insurance documents) for the Nissan, so he was including the vehicle in the schedule.

44. As to the tipper, Mr Goodliffe said that the mileage recorded on 10 April 2014 was 109,169 not 107,000 as the appellant said. Based on the mileages recorded on the MOT certificate the vehicle had done 77,888 miles on 28 January 2012 according to the MOT details. Therefore it had done 31,281 miles in 804 days in the period, giving 14,200 miles which made his estimate of 14,000 reasonable and fair.

45. He also amended the schedule to reflect 20 mpg as stated by the appellant (an admission which substantially increased the number of litres of fuel used and so increased the duty assessment).

46. As to the van, no record of sale had been produced so Mr Goodliffe maintained the schedule showing it as owned on 14 May 2014.

47. Following the review Mr Goodliffe had amended the assessment to £4,577 and enclosed a revised schedule showing how that was arrived at.

48. On 22 April 2015 (the next day) a revised notice of penalty assessment was issued showing wrongdoing penalty of £2,643.

49. A revised Penalty Explanation Schedule was attached. It still referred to FTN, but the remarks about not supplying records in the description of the FTN had been removed.

50. The reduction in the penalty range was increased to 35%, with 10% for "telling", 10% for "helping" and 15% for "giving". This made the percentage 57.75%.

51. The next step was an appeal made to the Tribunal by the appellant in 2016. In the course of correspondence with the Tribunal the appellant sent further receipts to it, photocopies of which were passed to Mr Goodliffe.

52. The appeal came on for hearing on 2 August 2017 in Manchester before the current Tribunal members. Shortly before the hearing was due to start the clerk informed us that the appellant's daughter had phoned the Tribunal to say that her father had been taken to hospital and could not attend. We ascertained from her via the clerk that the appellant wished to attend a hearing and did not agree to us hearing the case in his absence or on paper. We therefore postponed the hearing.

53. But we informed Ms Vicary, who appeared then as now for HMRC, that there were aspects of the penalty letters and notices which we thought HMRC should reconsider. First, the letters referred to a penalty under Schedule 24 FA 2007 ("Schedule 24") as amended by Schedule 41, when Schedule 24 had nothing to do with this appeal and had not in any event been amended by Schedule 41. Secondly the Penalty Explanation Schedules were on templates referring to FTN, not excise

wrongdoing and thirdly, the Statement of Case and Ms Vicary's skeleton referred to paragraph 4 Schedule 41 which was also not relevant in this case.

54. When we got the papers for the resumed hearing we found that there was an amended statement of case and an amended skeleton referring correctly to paragraph 3 Schedule 41. HMRC had also sent a letter to the appellant on 23 August 2017 explaining that it had recently come to their attention that there were some potentially misleading errors in the penalty notification letter and schedule issued on 22 April 2015. Those errors were explained and a revised schedule attached which referred to a wrongdoing penalty. The letter also asked if the appellant wished to submit any new evidence or information.

55. We consider the effect of the errors and the purported correction later.

Certain disputed matters of fact.

56. The appellant maintained that the van was sold in December 2013 despite it still being shown as his in DVLA records. However Mr Mawdsley recorded in his note book that the appellant said he owned "Ford Transit Connect PE54HHO". Because the appellant signed the notebook as true, and Mr Mawdsley could not have known of the vehicle otherwise, we find as a fact that on 10 March 2014 that that vehicle was owned by the appellant.

57. The appellant (and Mrs Ainsworth) maintained in correspondence and to us that the Nissan was not used in the business, and Mrs Ainsworth said that she had sent the insurance documents to Mr Goodliffe and had had a number of telephone conversations with him. Ownership of this vehicle, an R prefix one, was, the appellant said, something of a hobby, and it was not reliable at its age.

58. Mr Goodliffe denied that he had received the insurance documents. We doubt that Mrs Ainsworth would have insisted that she had sent them if the insurance documents did not back up the private use of the vehicle. We also consider that by its very nature the vehicle was unlikely to be used in a business dealing with concrete groundwork, where there was no significant number of employees needing to be transported.

59. There was a difference of opinion in the Tribunal about the Nissan. Judge Thomas considers that the nature of the vehicle, the lack of evidence of any need for it in the business and appellant's willingness to put forward the insurance as well as his written and oral assertions compared with no evidence from HMRC means it was more likely than not that the Nissan was not used in the business. Mrs Tanner is more sceptical, believing that the Nissan could have been used in the business and that the appellant had not shown that it was not eg by producing the insurance.

60. This is something of an unreal debate, because of the inherent illogicality of HMRC's position on this vehicle. It was clearly their view that if the vehicle was not used in the business despite being owned by the appellant, it was not of interest in deciding how much to assess for misuse of red diesel. But use or non use in the

business cannot be determinative of the question whether the appellant misused red diesel when driving or filling the tank of the Nissan.

61. In view of what will become apparent later, we do not need to decide this question. Had it been necessary Judge Thomas would have exercised his casting vote to find that the Nissan was not used in the business and should be excluded from Mr Goodliffe's calculations.

62. We have also considered the issue of mileages.

63. The only MOT information in the file is dated 2017 and included the history up to that year so this could not have been the record Mr Goodliffe used. He says that 14,000 was an estimate, but he also clearly had MOT information when he wrote to the appellant on 21 April 2015.

64. From the 2017 record we can see that for the tipper:

(1) On 26 January 2012 the odometer reading was 77,882

(2) On 28 January 2012 (retest) it was 77,888

(3) On 27 May 2014 it was 97,803

(4) On 15 April 2015 it was 109,308

(5) On 28 May 2016 it was 117,054

(6) On 11 January 2017 it was 127,125.

65. From this we can see that Mr Ainsworth's statement that the annual mileage was 10,000 was a reasonable estimate for May 2014 to May 2016 but that is after the period. We can also see that in the period under enquiry the mileage from January 2012 to May 2014 was almost exactly 20,000 miles in a 17 month period making Mr Goodliffe's estimate of 14,000 reasonable and fair.

66. We noted from Mr Mawdsley's test report that the sample he took tested negative for coumarin. However the report from the Government Chemist showed that the sample was 4% coumarin. HMRC agreed that coumarin was a marker for kerosene and that there must have been kerosene present in the tank when sampled. The appellant said that kerosene could have got in accidentally as one of the places he bought fuel, Naz, had had some issues with using kerosene and it could have contaminated the diesel he bought there.

67. Mr Goodliffe accepted that he had not taken the possible presence of kerosene into account in his calculations. He pointed out though that the rebate on kerosene is higher than on red diesel, so that if he had taken it into account the assessment would have been higher.

68. We find as fact that there was kerosene in the tipper when it was tested.

69. We noted that the appellant had been asked by Mr Mawdsley if he had had dealings with Customs before (see §9(7)). He had replied that his vehicle had been

tested twice and on both occasions was found negative for red diesel. Mr Goodliffe said he had made no enquiries to find out whether this had happened. We accept the appellant's account that he had been found negative on two occasions, but we do not know when they were.

Submissions by HMRC

70. Ms Vicary argued in relation to duty that:

(1) The appellant had used marked gas oil (red diesel) and marked kerosene in a UK road vehicle thereby contravening s 12(2) HODA and entitling HMRC to raise an assessment under s 13(1A) HODA.

(2) The assessment was raised to the best of Mr Goodliffe's judgement.

(3) Following *Thomas Corneill & Co Ltd v HMRC* [2007] EWHC 715 (Ch) ("*Corneill*") HMRC were entitled to assess all vehicles owned or operated by the appellant even though only one was tested.

(4) The burden of proof was on the appellant.

71. As to the penalty:

(1) The amount of the penalty is determined by the degree of culpability (paragraphs 5 and 6B Schedule 41).

(2) The appellant's actions were deliberate but not concealed.

(3) The disclosure was prompted.

(4) The basis for this characterisation is that:

(a) the use of red diesel was discovered by HMRC officers at the testing unit,

(b) the appellant conceded under caution that he knew it was an offence to use red diesel in a road vehicle,

(c) the appellant conceded his responsibility for the fuelling but did not accept he had done it personally, and

(d) the appellant provided only limited information despite repeated requests.

(5) Accordingly the appropriate penalty range is 35% to 70%.

(6) The reduction made was 35% giving a penalty of 57.75% of the potential lost revenue (the sum assessed).

(7) The reasonable excuse provisions in Schedule 41 were not engaged because the conduct was deliberate.

(8) No special circumstances had been asserted by the appellant.

72. She accepted that the burden of proof was on HMRC.

The appellant's submissions

73. From the grounds of appeal and other statements we see that the appellant says:

(1) It is unfair to suggest the he misused fuel regularly, which is what the mileage figures used by HMRC do.

(2) His employee fuelled with red diesel to get to a garage, without the appellant's knowledge and on which he has paid a £500 fine.

(3) The van had been sold on the date and was not in his possession.

(4) The Nissan was only for personal use and he can prove it

(5) His statements about the mileage of the tipper were incorrect because of his state of mind.

(6) He has more receipts than HMRC had seen and can prove it (we assume these are the receipts sent to the Tribunal).

(7) He had been tested before twice and the samples were negative.

Discussion – the duty assessment

The statute law

74. Sections 12 and 13 HODA provide (relevantly):

> "**12 Rebate not allowed on fuel for road vehicles**
>
> (1) If, on the delivery of heavy oil for home use[14], it is intended to use the oil as fuel for a road vehicle, a declaration shall be made to that effect in the entry for home use and thereupon no rebate shall be allowed in respect of that oil.
>
> (2) No heavy oil on whose delivery for home use rebate has been allowed … under section 11 above … shall—
>
> (a) be used as fuel for a road vehicle; or
>
> (b) be taken into a road vehicle as fuel,
>
> unless an amount equal to the amount for the time being allowable in respect of rebate on like oil has been paid to the Commissioners in accordance with regulations made under section 24(1) below for the purposes of this section.
>
> **13 Penalties for contravention of section 12**
>
> (1) Where any person—
>
> (a) uses heavy oil in contravention of section 12(2) above; or
>
> (b) is liable for heavy oil being taken into a road vehicle in contravention of that subsection,
>
> his use of the oil or his becoming so liable (or, where his conduct includes both, each of them) shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties).

[14] This term "home use" does not mean "for use in the home" eg in a central heating boiler. It is using "home" in the same sense as was used in the name of well known chain of grocers in the 19th and first part of the 20th century, Home and Colonial Stores. "Home" is the United Kingdom.

(1A) Where oil is used, or is taken into a road vehicle, in contravention of section 12(2) above, the Commissioners may—

(a) assess an amount equal to the rebate on like oil at the rate in force at the time of the contravention as being excise duty due from any person who used the oil or was liable for the oil being taken into the road vehicle, and

(b) notify him or his representative accordingly.

…

(3) A person who, with the intent that the restrictions imposed by section 12 above should be contravened—

(a) uses heavy oil in contravention of subsection (2) of that section; or

(b) supplies heavy oil having reason to believe that it will be put to a particular use, being a use which would, if a payment under that subsection were not made in respect of the oil, contravene that subsection,

shall be guilty of an offence under this subsection.

(4) A person who is liable for heavy oil being taken into a road vehicle in contravention of subsection (2) of section 12 above shall be guilty of an offence under this subsection where the oil was taken in with the intent by him that the restrictions imposed by that section should be contravened.

(5) A person guilty of an offence under subsection (3) or (4) above shall be liable—

(a) on summary conviction, to a penalty of £20,000 or of three times the value of the oil in question, whichever is the greater, or to imprisonment for a term not exceeding 6 months, or to both, or

(b) on conviction on indictment, to a penalty of any amount, or to imprisonment for a term not exceeding 7 years, or to both.

(6) Any heavy oil—

(a) taken into a road vehicle as mentioned in section 12(2) above or supplied as mentioned in subsection (2) or (3) above; or

(b) taken as fuel into a vehicle at a time when it is not a road vehicle and remaining in the vehicle as part of its fuel supply at a later time when it becomes a road vehicle,

shall be liable to forfeiture.

…

27 Interpretation

…

(1ZA) For the purposes of this Act, a substance is used as fuel for a vehicle if (and only if) it is used as fuel for—

(a) the engine provided for propelling the vehicle, or

(b) an engine which draws fuel from the same supply as that engine.

(1ZB) For those purposes, a substance is taken into a vehicle as fuel, …., if (and only if) it is taken into the vehicle as part of the supply from which the engine provided for propelling the vehicle draws fuel.

(1ZC) For those purposes, the following persons are liable for a substance being taken into a vehicle or into the fuel supply of an engine—

(a) the person who has charge of the vehicle or engine at the time the substance is taken in, and

(b) the owner of the vehicle or engine at that time (or, if another person is entitled to possession of it at that time, that other person)."

The burden of proof

75. A striking thing about s 13 HODA is the heading "Penalties for contravention of section 12", not "penalties, etc.". The discretionary ("may") levy of an amount equal to the rebate on the red diesel in question as if it were excise duty is, it seems, regarded as penal, especially as it sits cheek by jowl with the civil penalty provision in subsection (1) and the criminal offence carrying a possible 7 year sentence in subsection (3).

76. The penal or quasi-penal nature of s 13(1A) HODA is reinforced by HMRC's guidance on this area. Their Hydrocarbon Oils Strategy Manual (HOCS) in the section about "Post-detection audit and assessment" talks of the person being assessed under s 13(1A) as the "offender", and at HOCS5025 refers to the burden of proof that HMRC must discharge in relation to such assessments.

77. We further note that in *Corneill*, a case on red diesel assessments that is binding on us, it was stated that in cases such as this HMRC has to justify its position (see §92). As a result of these points we think it is too simplistic simply to say that the burden of proof is on the appellant to overturn or reduce the assessments. It is a case where we must consider all the evidence in the round and come to a conclusion as to what we think is likely to have happened.

Assessing procedures - duty

78. The procedural law on assessments under s 13(1A) is not obviously apparent, because there are other assessing powers in relation to excise duty in sections 12 and 12A FA 1994.

79. The first of these is clearly not relevant as it relates to assessments to excise duty which is not what s 13(1A) HODA does: that subsection recovers an amount equal to the rebate on the misused fuel, not duty.

80. Section 12A(1) contains a separate assessing power where relief has been given which ought not to have been given, which on the surface seems to cover what was done in this case. But it was held in *Corneill* (or rather accepted by HMRC) that s 12A cannot apply in cases such as this, although before the VAT and Duties Tribunal in that case it was HMRC's case that s 12A could apply. *Corneill* does not say why

HMRC accepted that s 12A is inoperable in a case such as that one and this. HOCS does, though. The point HOCS5025 makes is that s 12A can only apply to a trader, not an end user, because the liable person is the person to whom the rebate was given. That will be a trader in oils, not an end user – the end user merely benefits from the rebated status of red diesel.

81. But section 12A(3) is a more general provision which applies both to s 12A(1) assessments and to a range of others. It refers in particular to a case where an amount has been assessed on a person under s 13 HODA to deem the amount assessed to be excise duty.

82. Section 12A(4) then contains time limits and applies them to cases of assessments listed in s 12A(3) which as mentioned includes a s 13 HODA assessment.

83. The time limits for making assessments are as for excise duty assessments under s 12, the limit being the earlier of:

(1) a date one year from the day on which evidence of facts sufficient to justify making the assessment came to HMRC's knowledge; and

(2) four years from the time of the action which gave rise to the power to assess.

In cases of deliberate conduct the limit is 20 years, not four.

84. A further noteworthy point about s 13 HODA assessments is that the "best judgement" requirement that applies to assessments of excise duty (s 12(1) FA 1994,) does not apply to assessments under s 13 HODA (nor for that matter to assessments under s 12(1A) and s 12A(1) FA 1994). But in practice this is irrelevant (see [31] in the passage from *Corneill* at §89).

85. If we consider the assessment in this case in the light of this law then it was clearly notified to the appellant in accordance with s 13(1A)(b) HODA. It was also in time as the assessment was made within a year of the evidence of the conditions necessary to support the assessment becoming available to HMRC and was made within 4 years of the first contravention of s 12 HODA relied on.

86. Section 13(1A)(a) requires that the assessment is of an amount equal to the rebate on red diesel in force at the time of the contravention. The assessment in this case is at two different rates, one applying from 21 January 2011 to 22 March 2011 and the second thereafter.

87. Section 19 FA 2011 amended the rate of rebate in s 11 HODA for gas oil and the amendment was treated as coming into force at 6 pm that day (s 19(7)). By taking the assessment at the previous rate to the end of 23 March 2011, it is possible that the wrong rate was applied to any taking in of red diesel after 6 pm on 23 March and of any use of red diesel after that time where it was taken in before that time. For reasons which will become apparent this point is of academic interest only.

The case law - duty

88. The main issue with the assessment is of course the calculation, and the reflection in the calculation that only one of each type of contravention, that on and before 14 March 2014 the tipper was used and fuelled with red diesel, is actually admitted and established.

89. HMRC pray in aid *Corneill* in support of their proposition that they are entitled to assess in relation to all (diesel-powered) vehicles owned or operated by the individual or business in question. *Corneill* is a decision of Mann J in the Chancery Division on appeal from the VAT & Duties Tribunal, and is of course binding on us for what it decided. It seems to us that the relevant passages from the judgment of Mann J are:

> "30. … An assessment can be made where it can be demonstrated that oil has been 'used or is taken into a road vehicle in contravention of Section 12(2)'. It is not possible to read into that part of the section any particular evidential requirements as to how closely one has to tie any particular fuel to any particular vehicle. All one can say about the quality of evidence that underlies such an assessment is that there has to be enough. There is a contravention if it is taken into a road vehicle. That can be demonstrated in a number of ways. The clearest way is a vehicle that is caught with fuel in its tank.
>
> 31. … There has to be a sufficient evidential linkage between rebated oil and use in a vehicle to give rise to an inference that oil in a provable quantity has been placed into a vehicle. Sometimes a great degree of particularity will be available, sometimes it will not. I can see no legislative purpose in defining some sharp cut-off line in a degree of particularity which is required. What is required is appropriate proof and evidence of the facts.
>
> 32. Nothing can be read into the absence of a reference to 'best judgment' in Section 13. It is true that the expression is used in Section 12 of the 1994 Act, but its absence from Section 13 of HODA is, in my view, not a bar to the exercise of some judgment in the assessment which HMRC is entitled to make under Section 13. It seems to me to be inevitable in the real world, and in many cases, unless a culprit is caught red-handed, that some element of judgment or assessment is going to be necessary to make the section work. I do not see why it should be confined to the red-handed. A recalcitrant haulier may mix red and white diesel from time to time in a manner which makes it impossible to say for certain that a specified quantity was used in a given lorry or lorries at a given time which would enable HMRC to show extremely clearly that over a period of time a given quantity of red diesel was used in unspecified lorries, even if none of them are caught with red diesel in the tanks. I can see no legislative purpose in excluding that situation from the operation of Section 13 and there is nothing in the working of the section which requires it. The reasons of Mr Gilmore in the present case contains a greater degree of assessment and estimation that might be required in my example, but I can see no reason why such a process should be excluded.

> 33. I therefore consider that Mr Barlow is wrong in his submission that no element of estimation, or no significant element of estimation, is permitted under Section 13. What is required under Section 13 is appropriate evidence. Inferences can be drawn from primary facts. That is a standard process in many walks of life and is appropriate to assessments under Section 13. Estimation in this context is merely one way of describing a process of inference. If it is said that HMRC have got the primary facts or the inference wrong, then an appeal mechanism exists."

90. And:

> "40. The point boils down to one of whether or not the Tribunal was entitled to reach the final conclusion that it did on the basis of the evidence that it had. The only direct evidence of use of red diesel in the lorries was that of the lorry which was actually tested. No other red diesel was found on the premises or in lorries.
>
> 41. However, there was indirect evidence. There was evidence that persons known to supply mainly red diesel had received payment. One of the actual alleged suppliers was known to supply red diesel. If legitimate white diesel had been delivered and used one would have expected Thomas Corneill to have been able to demonstrate that clearly. Instead it produced a series of demonstrably false invoices and was unable to supply details of its contacts at the alleged suppliers. The Tribunal was obviously very unimpressed with the quality of evidence from Thomas Corneill, and in particular with the missing evidence.
>
> 42. Of course Customs & Excise had to justify its position and it clearly demonstrated that the documentary evidence did not show a clear and legitimate source of white diesel and left many questions which Thomas Corneill had failed to answer."

91. As to what it is in the decision in *Corneill* is binding on us, we think it is simply the proposition that in making their assessment HMRC are not bound only to consider matters where the appellant has been caught red handed (whether literally or metaphorically) even if there is no other direct evidence of misuse.

92. But *Corneill* is also valuable for stressing that which perhaps did not need to be stressed, that it is for the first instance Tribunal to find the facts and to draw any necessary inferences from them. And in [42] it stresses that HMRC has to justify its position.

93. The appeal in *Corneill* failed. But it is worth pointing out a number of facts that were present in *Corneill* that led to the appeal failing.

94. First and foremost the appellant in that case did not contest the correctness of HMRC's assessments (see [38]). Its appeal was essentially procedural. In addition:

(1) Apparent white diesel receipts/invoices were found to be false.

(2) Invoices were paid in an unconventional manner.

(3) The "indirect evidence" to support the assessment was that the appellant in that case had paid suppliers of red diesel.

It is perhaps not surprising that the appellant in that case did not dispute the calculations.

95. *Corneill* then does not really assist us in coming to a conclusion on this case. HMRC have made their assessment, and *Corneill* says they are entitled to do it in the way they did. Mr Ainsworth, the appellant here, disputes it. So, as both sides accepted in *Corneill* was the correct approach, the Tribunal should "concentrate on the question 'what amount of tax is properly due from the tax payer', taking the material before it as a whole and applying its own judgment.", a quotation from *Ramon v Commissioners of Customs and Excise* [2003] STC 150 (Chadwick LJ) and we proceed to examine the evidence.

Mr Goodliffe's calculations

96. The cornerstone of Mr Goodliffe's calculations is the lack of fuel receipts for white diesel. The fuel in the receipts he was given by the appellant in 2015 totals (he says) 996 litres, compared with his estimate of 10,772 litres used in the period (thus the vouched quantity is less than 10% of the total).

97. The calculations therefore assume that about 90% of all mileage was done using red diesel. The question for us is: is that realistic and is it borne out by the evidence?

98. In this case HMRC sought receipts for white diesel for a four year period going back to nearly 5 years before the request. The appellant is not registered for VAT and Mr Goodliffe confirmed to us that an end user of red diesel is not obliged to maintain records of their purchases. But the appellant did supply receipts covering the period July 2012 to March 2014.

99. There are two particular matters concerning the receipts which make us think that the calculations are not realistic. But first we note that Mr Goodliffe's calculation actually *overstates* the total mileage in the receipts that the appellant verified. There is a purchases of fuel on 9 May 2015 from Morrisons totalling 148.3 litres. This must we think be a misprint for 14.83, especially given that nearly all other prices are of 14+ or 7+ litres (representing the purchase of £10 or £20 worth of fuel).

100. We noted that, once the errant transposition of the decimal place is corrected, approximately 330 litres out of a total of approximately 870 (about 40%) are in the two months May and June 2013. If the receipts listed are a true record of the only white diesel purchases this is an extraordinary result. There are a number of possible explanations: it could reflect the fact that there were also about 3000 litres of red diesel purchased and used in that period, about a third of the total such purchases alleged. This would amount to the tipper doing at least 18,000 miles in two months, but the MOT records make this extremely unlikely, if not impossible; it could reflect the fact that for those two months but no others the appellant was unable to source red diesel, at least in the quantities otherwise used and was forced to resort to white

diesel; or it could mean that for one reason or another the records for these two months are the only ones that in any way give a complete or nearly complete[15] picture.

101. We asked Mr Goodliffe if he had noticed this pattern of distribution and if he had taken account of it at all. He said he had not.

102. The second matter which makes us think that the receipts supplied in 2015 are not the full story is the supply by the appellant of further receipts to the Tribunal (see §51). These were copied by the Tribunal and copies were sent to HMRC, the originals being returned to the appellant. Mr Goodliffe felt unable to amend his assessment because of illegibility or because they were outside the relevant period. At the hearing neither party brought these to our attention.

103. Judge Thomas has found the copies of the receipts in the Tribunal file. There are indeed some illegible receipts (in the sense that the date cannot be determined). But that seems to be because the photocopying was not done well as we doubt that the originals (which is what the Tribunal saw and photocopied) were also illegible. There were 11 actually illegible copies of receipts. Of the remaining 58, 14 were outside the time of the HMRC compliance check and 44 were inside. None of the 44 entries were on Mr Goodliffe's list. That list contained 73 entries.

104. If the illegible receipts split in the proportion of in time and out of time ones, then 7 or 8 of the illegible ones were in time, taking the "good" receipts over 50. We find then that, on the balance of probabilities, that there were at least 50 purchases of legitimate diesel which did not appear on Mr Goodliffe's list and were not taken into account by him. Four of the receipts (about 50 litres) were in the period May and June 2013[16].

Conclusions

105. In coming to a conclusion on the assessment we have taken the following matters into account:

(1) The appellant did on one occasion use, and was liable for the taking into his vehicle, red diesel.

(2) The appellant said that this was not his doing, but that of an employee who used it in an emergency and that the employee or "one of the lads" may have done so on other occasions.

(3) He said he did not misuse red diesel regularly.

(4) He made an admission that was contrary to his interests in saying that the mpg of the tipper was 20 mpg rather than HMRC's figure of over 31 mpg.

(5) On 10 April 2014 he admitted owning the van but later argued that he had sold it to a neighbour before that date.

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[15] See §104

[16] See §100

(6) He was not obliged to keep receipts of fuel purchases, of either red or white diesel.

(7) The receipts pattern for May and June 2013 compared with the rest.

(8) Mr Goodliffe's refusal to take into account at all the receipts provided to the Tribunal, many of which were clearly relevant to the period of his check.

(9) There are none of the adverse factors that we listed in §94 that were present in *Corneill*.

(10) The appellant had had two previous testings of fuel, both of which were negative.

106. On the balance of probabilities we find that the number of receipts for white diesel in May and June 2013 was typical of the whole period of the assessment and that usage and putting in of red diesel was occasional and sporadic and not the doing of the appellant.

107. Making the best estimate that we can on the information we have, including that Caleb or another employee would be given £10 or £20 to refuel, we consider the number of litres of red diesel put in the appellant's vehicles was no more than 150 (say 10-12 occasions). We have therefore accepted the appellant's evidence on the taking in of red diesel by Caleb and "the lads", and not by him, as true. At £0.46810[17] per litre, the rebate figure used in the workings, we reduce the assessment to £70.21.

108. Mr Goodliffe's calculation of the usage of red diesel was intended to cover the whole period between 21 January 2011 and 10 April 2014. It therefore includes the putting of the red diesel into the tipper before 10 April 2014 which was the contravention leading to the seizure on that date. We asked Mr Goodliffe whether in his calculations he must have effectively assessed the rebate on the red diesel which was included in the amount paid as the fee for restoration of the vehicle on 10 March 2014. He said he had. He was it seems inclined to agree with us that this was double counting.

109. Ms Vicary argued that the amount to be excluded on this basis was not £39 but the rebate on one day's fuel usage in the calculations which she suggested was much less (£3 on the basis of the difference between the duty assessment and the potential lost revenue used in calculating the penalty). It is a very small issue but we disagree with Ms Vicary on this: as Mr Mawdsley said, the tank was nearly empty on 10 April so it must follow that the red diesel had been put in some days before and that Mr Goodliffe's calculations must be assumed to have included the whole of the £39. Accordingly we reduce the assessment to £31.21.

110. In coming to this figure for assessment we have not considered the question of kerosene (see §§66 to 68). We put this point to Mr Goodliffe who explained that if he had taken account of the Government Chemist's report and assumed that some of the illegitimate fuel was kerosene, not red diesel, that would have been to the appellant's disadvantage, because the rebate on kerosene is greater than that on red diesel.

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[17] Because we think that these few occasion were after 2011 we have used the post FA 2011 rate only.

111. That is true, but he did not make any change. Ms Vicary also pointed out that if the Tribunal were to reduce the assessment on account of kerosene being present, it would be open to HMRC to raise an assessment under the relevant section of HODA. At the time the Tribunal agreed with her about his, but on reflection we think that such an assessment would be out of time, on the basis that it is now more than one year since evidence of kerosene in the tank came to HMRC's knowledge. But as we have said we do not take any point on it now.

Discussion – Penalties

Is the penalty assessment valid?

112. The first notice of penalty assessment made by HMRC says that it is a notice of a liability to "a penalty under Schedule 24 of the Finance Act 2007 as amended by Schedule 41 of the Finance Act 2008". It is not in fact a notice of an assessment to a penalty under Schedule 24 as that Schedule penalises errors in specified documents including income tax and VAT returns. No such errors are alleged here. Nor does Schedule 41 amend Schedule 24.

113. The body of the assessment notice says the assessment charges wrongdoing penalties. It also says that explanatory schedules are enclosed, but no such schedules are in the bundle.

114. There was one schedule sent slightly less than 4 weeks previously with a document that said it was not a notice of penalty. If the appellant had gone to that schedule for enlightenment about Schedule 24 or wrongdoing, he would have been disappointed because the schedule referred to a penalty under Schedule 41 for failure to notify.

115. There is nothing however that the appellant had failed to notify, at least nothing set out in the schedule, because against the label "Description of the failure to notify" was a statement of the events of 10 April 2014 and of the appellant's failure to provide books and records.

116. In our view no valid notice of a penalty for wrongdoing within paragraph 3 Schedule 41 based on the events of 10 April 2014 was issued on 20 March 2015.

117. In a case where the Taxes Acts apply (eg income tax or corporation tax) we would look to s 114 Taxes Management Act 1970 ("TMA") to see if the (lamentable) want of form of this notice and schedule could be rectified. There appears to be no equivalent to s 114 TMA in excise duty or any indirect tax that we can see. We assume s 114 TMA expresses in statutory form a common law principle about assessments to tax or duty and probably other impositions leading to a demand for money by the state. We therefore apply s 114 TMA by analogy. There have been a number of decisions about s 114 in recent years which are binding on us, and others which, being in same level jurisdictions, are persuasive only.

118. The non-binding decisions are ones on penalties, so we look at them first. In *Austin v Price (HM Inspector of Taxes)* SpC 426 the Special Commissioner (Dr John Avery Jones) said:

> "8. The £340 notices for both years are also in my view bad by stating two different figures for the penalty: £340 at the beginning and £340 per day for 34 days at the end. It is more probable that it meant to state £10 per day at the end rather than £11,560 at the beginning, particularly as the latter is greater than the maximum, but the taxpayer should not be expected to make corrections to discover the amount of the penalty. When imposing a daily penalty it is clearly important that the daily rate should be stated correctly. In addition, the notice states that the taxpayer has failed to produce documents whereas he was required to produce accounts and particulars. Although it is the s 19A notice that determines what the taxpayer is required to produce, which is referred to by its date, *the taxpayer is entitled to know what he has failed to do for which the penalty is being imposed;* he might, for example, have partly complied with the notice in which case it would be important that what he had failed to do should be accurately specified. I do not consider that s 114 can save the notices as being 'in substance and effect in conformity with or according to the intent and meaning of the Taxes Act'. If a daily penalty is imposed it must be clear to the taxpayer how it is calculated and what is the total, and the notice must state what the taxpayer has failed to do. As Megarry J said in Fleming v London Produce [1968] 2 All ER 975 at 987, 44 TC 582 at 597: 'I would be slow to accept that [the predecessor of section 144] provide[s] an impervious coverlet for gross errors'. I regard these as gross errors. …"

119. In *Jacques v Commissioners for Her Majesty's Revenue and Customs* Spc 577, another decision of Dr Avery Jones also about penalties, he said:

> "7. Dealing first with the validity of the Penalty Notice, since 25 February 2005 is stated to be the start date of the daily penalty, one can deduce from s 97AA(1)(b), which was attached to the notice, that that date must be the day following the imposition of the fixed penalty (of an earlier daily penalty) and so it must be the wrong date for the s 19A notice. Ms Kennerley contends that, unlike in the *Austin* case one can deduce the correct date because, as is common ground, only one s 19A Notice has been issued to the appellant. I might have accepted this argument if the s 19A Notice had been correctly described. But the Penalty Notice refers to the s 19A Notice being a notice 'to produce such documents and furnish such accounts or particulars as were specified in that notice …' (which follows the wording of s 19A), whereas it was a notice to produce certain documents and to provide information (which I take to be the same as 'to furnish … particulars'— on the meaning of which, see *Accountant v Inspector* [2000] STC (SCD) 522) in the form of a statement of assets and liabilities at 5 April 2003, and not to furnish any accounts. I consider therefore that too great an ambiguity has been created for the Penalty Notice to be saved by substituting 3 August 2004 as the date of the s 19A Notice."

120. These cases were relied upon by the appellant in *Pipe v Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 646 (Ch) ("*Pipe*"). Henderson J (as he then was) did not suggest they were wrongly decided.

121. The decision of the Court of Appeal in *Donaldson v HMRC* [2016] EWCA Civ 761 ("*Donaldson*") includes this passage from the judgment of Lord Dyson MR:

> "In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of [s 114(1) TMA]. I agree. The same applies to omissions."

122. We do not think that the decisions of Dr Avery Jones were plainly wrong – in fact we agree with them. In our view in both of the cases he decided the errors were less serious than in this case. In the light of *Donaldson* (and *Pipe*) we have to consider whether the errors were too gross to fall within s 114 or any other view of what may be sufficient to rescue them from being held invalid. In our opinion the errors in this case were more gross than in the cases before Dr Avery Jones and we hold the assessment to penalties to be invalid.

123. The same must apply to the amended assessment issued on 22 April 2015.

124. HMRC's letter of 23 August 2017 issued to the appellant following our pointing out the errors to HMRC does not purport to be, or to enclose, a further notice of assessment.

125. It follows that the appellant's appeal against the penalty succeeds. However as Ms Vicary pointed out, HMRC are still in time to make a fresh penalty assessment. Paragraph 16 Schedule 41 provides as to time limits:

> "(4), An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—
>
> (a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
>
> (b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.
>
> (5) In sub-paragraph (4)(a) "appeal period" means the period during which—
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn."

126. In this case an appeal has been brought against the assessment, and the appeal is determined by this decision. "Tax" without more includes duty, so says paragraph 24(3) Schedule 41. While the assessment is not an assessment to excise duty or more specifically hydrocarbon oil duty, it is by the fullout of s 12A(3) HODA deemed to be excise duty which is a duty, and so deemed to be a tax. Thus the time limit for a fresh penalty assessment has only just started.

127. We therefore go on to consider the penalty assessment that was made on 22 April 2015 as that was the one appealed against (and it *was* appealed against, despite HMRC's attempts to say that it was not: it is quite clear from the Notice of Appeal itself and from an email from the appellant to the Tribunal). We do this in case we are appealed on the invalidity point and to give guidance to HMRC should they consider seeking a fresh penalty. We consider the explanations given in the schedule attached to the letter of 23 August 2017, as at least that one correctly identified the only provision under which the penalty could be charged, paragraph 3 Schedule 41.

128. Paragraph 3(1) provides that a penalty is payable by a person ("P") where P does *an* act [*our emphasis*] which enables HMRC to assess an amount as duty due from P under any of the provisions in the table below sub-paragraph (1). The table includes "HODA section 13(1A)". Paragraph 3(1) thus applies because the appellant admittedly did an act, using the red diesel in the van on 10 April 2014, which enabled HMRC to assess him under s 13(1A) HODA.

129. It is however obvious from the amount of the penalty assessed that HMRC are not simply penalising the single act which was admitted by the appellant. They are seeking to penalise any act which permitted them to assess under s 13(1A) HODA. They do not specify which of the acts of using red diesel and taking it into the tank, both of which can lead to an assessment under s 13(1A) HODA, they are penalising. But on any view there must be a large number of such acts encompassed by the assessment.

130. Paragraph 6B says:

> "The penalty payable under any of paragraphs 2, 3(1) and 4 is—
>
> (a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,
>
> (b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and
>
> (c) for any other case, 30% of the potential lost revenue."

131. HMRC say that the relevant paragraph is paragraph (b). Paragraph 5(3) tells us that:

> "The doing by P of an act which enables HMRC to assess an amount of duty as due from P under a relevant excise provision is—
>
> …
>
> (b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it."

132. This is not helpful, as "deliberately" is nowhere defined. The everyday meaning of deliberately in relation to an act is that there must be knowledge that it is being done and that the act is intended.

133. In this case we have found that red diesel has been used by the appellant on more than one occasion. But his using the red diesel does not make his act a

deliberate act if he did not know there was red diesel in the tank. In our view HMRC has not shown that the appellant did know there was red diesel in the tank on the 10 April 2014 let alone at any other time. His taking responsibility for there being red diesel in the tank does not make him party to an act, let alone an act done deliberately.

134. There is another act in s 13(1A) HODA which leads to a rebate amount, and hence deemed duty, assessment, namely the taking into the vehicle of red diesel. HMRC have not shown that the appellant did that, and we have not found that he did. Had he done so it would have been a deliberate act.

135. But by paragraph 21(3) Schedule 41:

> "In paragraph 3(1) the reference to the doing by P of an act which enables HMRC to assess an amount as duty due from P under a relevant excise provision includes the doing of such an act by a person who acts on P's behalf; but P is not liable to a penalty in respect of any action by P's agent where P satisfies HMRC or (on appeal) the First-tier Tribunal that P took reasonable care to avoid it."

136. We have accepted the appellant's evidence that "Caleb" or "one of his lads" must have put the red diesel in the tank[18]. The question is whether the employee was fuelling the vans with red diesel or using the diesel by driving the van "on P's [*the appellant's*] behalf".

137. HMRC's Compliance Handbook at paragraph 98200 says:

> "the employee will be responsible for the wrongdoing, not the employer if the employee clearly acted in their own interest and not on behalf of or to the benefit of the employer."

138. On the basis of what the appellant told us, the employees were not fuelling with red diesel because the appellant told them to. He gave them money to buy white diesel. They were putting red in because it was cheaper than white, and they would pocket the difference for themselves.

139. Since the employees were not, in doing the impugned act, acting on behalf of the appellant, the question of whether the second half of paragraph 21(3) is in point does not arise. Had it been in point we would have said that we were not satisfied that the appellant took reasonable care to avoid the act being done. If he had suspicions that Caleb might be using red to save himself money where the appellant had given him £10 or £20 to fuel with white diesel, he could have ensured that he got the receipt for the full amount. But that is not relevant.

140. There is something else which can also lead to an assessment, that is being liable for the use or the taking in of red diesel. But that is not an act.

141. Thus we hold that the appellant's conduct was not deliberate. The maximum penalty is therefore 30% of the potential lost revenue ("PLR").

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[18] see §107.

142. PLR in a paragraph 3 case means "the amount of the duty which may be assessed as due" as a result of doing "the act" (paragraph 9 Schedule 41). The penalty assessment covers the period up to 9 April 2014, the day before the testing. So a reduction to the rebate amount assessed as if it was duty in order to find the PLR is required, on account of the difference in dates. A reduction was made by HMRC as the PLR was £3 less than the deemed duty assessment. But we have in any case made a reduction of the duty assessment on account of the payment of duty on that day by way of restoration fee, so the maximum possible amount of the PLR is, we have decided, is £31 (rounding down the pence), ie £70 less the £39 paid as part of the restoration fee.

143. This is only the full amount of the PLR if it can be shown by HMRC that the acts which led to the assessment were acts of the appellant. That, as we have said, can only be the act of using, not the act of taking in, as HMRC can only rely on using to justify the penalty. We will assume, perhaps charitably to them, that the assessment and the penalty only cover using.

144. The reduction that may be given from the maximum penalty of 30% of PLR depends on the quality of the person's disclosure. "Disclosure" is not confined to the act of confession of wrongdoing, but involves a complex process of telling HMRC about the relevant act, giving them reasonable help in quantifying the duty unpaid by reason of that act and allowing access to records.

145. This again raises the question of what is the "act", where HMRC are alleging a course of conduct over many years where, if Mr Goodliffe's calculations are correct, the acts must have numbered about 1,000 (c. 10,000 litres where the average amount put in seems to be about 10 litres). Our view is that there may have been 12 or so occasions.

146. The appellant disclosed (by telling) HMRC on 10 April 2014 about the acts of Caleb or the lads at the testing site, not only for the 10 April 2014 contravention but for the others we have also found to have happened. He is therefore due the full reduction for telling of 30%.

147. As to helping, the appellant gave some receipts after a couple of requests (neither "numerous" or "several" as HMRC have said) and some information about the vehicles, which HMRC did not find satisfactory. Further receipts were provided late. We agree that the full reduction cannot be given but we think 20% would be more appropriate than the 10% HMRC gave, partly on account of the fact that HMRC obtained much of the information they wanted themselves.

148. As to giving access to records, none was asked for. Nor did HMRC seek to test the other vehicles at any time. In that situation HMRC's policy as shown in the Compliance Handbook[19] is to give the maximum reduction, here 30% and that is what we give. The total reduction is therefore 80%.

[19] Paragraph 73240.

149. 80% of what? That depends on whether the disclosure was prompted or unprompted. The disclosure at the testing unit was prompted, but that is not being penalised under paragraph 3 Schedule 41[20]. The disclosure of the occasions apart from the one on 14 April was unprompted because it would not have been possible for HMRC to have discovered them. The appropriate minimum is therefore 10%, that for unprompted disclosures. The range is therefore 20 percentage points (10 to 30), of which 80% is 16. The penalty percentage is therefore 14 (30–16).

150. The penalty is therefore 14% of £31 which is £4.34.

151. Because the behaviour was not deliberate, then the penalty can be cancelled if the appellant had a reasonable excuse for his acts. As to using the vans with red diesel in them, we would say that he did, as he was unaware of the presence of red diesel and could not be expected to test his vehicles himself.

152. As to putting in, if that is in issue (which is doubtful), he relied on others not to put in red diesel when they did. That reliance is not a reasonable excuse unless he took reasonable steps to prevent the act. We have already said that we are not satisfied that he did. Because there are numerous acts giving rise to a penalty we think the appropriate thing to do would be to cancel half of the penalties. This would make the total penalty £2.17 if the assessment was, contrary to our finding, valid.

Decision

153. Under s 16(5) FA 1994 we vary the assessment under s 13(1A) HODA to be an assessment of £31.21.

154. Under paragraph 19(1) Schedule 41 we quash the assessment of penalties.

155. But if we are wrong about that, under paragraph 19(2) Schedule 41 we would vary the assessment to be an assessment for £2.17 (two pounds seventeen pence).

156. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 29 NOVEMBER 2017

[20] The penalty assessment only goes up to 9 April 2014 in recognition of the fact that the appellant has paid the equivalent of two penalties under s 9 FA 1994 in the restoration fee.